No. 83-____

83.1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY JOHN EKLUND,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

RUSSELL JAMES MARTIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETER M. SHANE,
Counsel of Record
Cooperating Attorney,
Iowa Civil Liberties Union
3019 Pinecrest Road
Iowa City, Iowa 52240
(319) 353-5489

MARK W. BENNETT
Staff Counsel
Iowa Civil Liberties Union
Des Moines, Iowa 50312

CHARLES S. SIMS
BURT NEUBORNE
American Civil Liberties Union
New York, New York 10036

August, 1984

TABLE OF AUTHORITIES

No. 83-1959

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GARY JOHN EKLUND,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

----------*----------

RUSSELL JAMES MARTIN,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

LEGISLATIVE HISTORY DOES NOT SUPPORT THE GOVERNMENT'S ARGUMENT THAT NONREGISTRATION IS A CONTINUING OFFENSE.

Contrary to what the Government's brief in Eklund implies, there is no legislative debate or

commentary on the issue of statutory interpretation common to Eklund and Martin that is useful on the question presented. Petitioners, in urging that the statute of limitations for draft nonregistration, 50 App. U.S.C. sec. 462(d), does not make nonregistration a continuing offense, omitted mention of the debates and commentaries precisely for this reason.

The unreliability of congressional debate to guide this Court as to the meaning of 462(d) is amply demonstrated by a complete reading of Sen. Byrd's remarks, which the Government only excerpts in its brief. Gov't Brief at 13-14. In the passages that the Government quotes, Sen. Byrd refers to 462(d) as imposing a "continuing responsibility to register." At one point, he even uses the phrase "continuing offense." 117 Cong. Rec. 18445 (1971). In the same colloquy, however, Sen. Byrd also states:

> The Supreme Court in Toussie v. United States, 397 U.S. 112 (1970) interpreted congressional intent as being that failure to register is a single act.

> That is what Justice Black said in his statement which the Senator from Alaska read as interpreting the laws that now exist. There is no quarrel with Justice Black's interpretation.
>
> . . .
>
> I do not say that the Court is wrong.

Id., at 18446. Thus, in the same statement in which Sen. Byrd uses the phrase "continuing responsibility" to explain the impact that amended 462(d) will have on the statute of limitations, he disavows any quarrel with Justice Black's interpretation of the nature of nonregistration as an offense.

All that this history "clarifies" is that Congress, in amending 462(d), did not focus on the impact of the amendment on the elements of the offense of nonregistration; its only interest was in prolonging a nonregistrant's vulnerability to prosecution. See also, id., at 8634 [remarks of Rep. Hebert], 8636 [same], 9005-07 [remarks of Rep. Mikva, et al.], 18444-47 [remarks of Sens. Byrd, Gravel, et al.], 18769-71 [remarks of Sens. Gravel, Stennis, et al.] (1971).

The sole reference to a "continuing requirement" of registration in legislative committee reports occurs in the report of the House Committee on Armed Services on the proposed amendment: "This change is appropriate not only to emphasize the continuing requirement of registration but also as a reflection of equity to those men who comply with the registration requirements and remain liable until age 26." H. Rept. No. 92-82, 92d Cong., 1st Sess. 17 (1971). The subsequently issued Senate report, however, dropped the reference to a "continuing requirement" in paraphrasing this very sentence: "This change is deemed appropriate not only as a deterrent to non-registration but also as a reflection of equity to those men who comply with the Act's registration requirements and remain liable at least to age 26." S. Rept. No. 92-93, 92d Sess. 22 (1971). If anything, this implies that the Senate Committee intended that the statute of limitations change would not make nonregistration a continuing offense.

This Court has said: "In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws." S & E Contractors v. United States, 406 U.S. 1, 13 n.9 (1972). In the case of 462(d), no such precise analyses exist.

What is undisputed is as follows: No express reference to a continuing offense of nonregistration appears in 462(d). The Supreme Court told Congress in 1970 that any such reference must be explicit to create a continuing offense. Toussie, 397 U.S. at 115. Congress amended the Act in 1971 without making any such reference. In the induction provisions of the same Act, where Congress wanted to impose continuing liability, it used the phrase "continue to remain liable." 50 App. U.S.C. sec. 454(a). In sum, Congress did not intend that nonregistration be a continuing offense.

Respectfully submitted,

PETER M. SHANE
MARK W. BENNETT
CHARLES S. SIMS
BURT NEUBORNE

Attorneys for Petitioners

August 1984